United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,755

228

DAVID BELTON,

Appellant

-versus-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Thomas R. Dyson, Jr.
500 Hill Building
839 17th Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Whether the denial by the lower court of appellant's motion for a preliminary hearing so prejudiced appellant that any possibility of a fair trial was removed.

2. Whether the evidence was such that reasonable jurymen must necessarily have a reasonable doubt, therefore, requiring the Court below to order a judgment of acquittal.

JURISDICTIONAL STATEMENT

Appellant stands convicted by a jury in the United States District Court for the District of Columbia of one count of robbery. The jury verdict was received on August 24, 1965. Notice of appeal was timely filed.

Jurisdiction of this appeal is vested in this Court by virtue of Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

The Food Plaza, Inc., located at 441 Chaplin Street, S. E., Washington, D. C., was held up by four men on March 26, 1965, at approximately 9:00 p.m. Appellant Belton was subsequently indicted on two counts of robbery in violation of D. C. Code Title 29, Section 2201. He and Robert L. Garnes were tried in the United States District Court for the District of Columbia, which resulted in a jury verdict of guilty on the first count and not guilty on the second count as to appellant Belton. Garnes was convicted on both counts.

Appellant Belton was not given a preliminary hearing even though a pretrial motion was filed on his behalf by appointed counsel seeking a preliminary hearing.

The only evidence introduced by the government against the appellant was identification testimony placing him on the scene of the robbery as an active participant.

SUMMARY OF ARGUMENT

Appellant asserts at the outset that his right to a fair trial was prejudiced by his lack of a preliminary

hearing. This defect in the criminal proceedings against him requires a reversal of the conviction and the granting of a new trial.

All the evidence against appellant introduced by the government consisted of identification testimony placing the appellant on the scene of the robbery as an active participant. Appellant's ability to prepare his defense against such evidence was clearly hampered when the first opportunity for both appellant and his counsel to hear this testimony was during the trial itself.

Secondly, the evidence against appellant was in such a posture that the Court should enter a judgment of acquittal on the grounds that a reasonable doubt as to the guilt of appellant existed as a matter of law.

ARGUMENT

The government's case against appellant Belton consisted solely of identification testimony which placed him on the scene of the robbery and as an active participant. Four witnesses, Hydes (Tr.23), McKee (Tr.85), Carson (Tr.114) and Austin (Tr.132), positively identified

Belton as one of the four men who robbed the store. Three other witnesses, all of whom were in the store, Halfpap (Tr.56-57), Jordan (Tr.75,76) and Trittipoe (Tr.105), were unable to positively identify appellant Belton as one of the four robbers.

Mrs. Garnes, mother of the co-defendant below, testified that four men, including her son Robert, arrived at her house minutes after the robbery. She stated that they appeared as if they had been running. Mrs. Garnes positively testified that Belton was not one of the four men who came to her house (Tr.176).

Appellant Belton introduced one witness in his behalf, Charles B. Manley, Jr. Mr. Manley was an alibi witness and testified that appellant was with him and in another section of town at the time of the robbery (Tr.246 - 250).

Counsel representing appellant filed a pre-trial motion requesting that a preliminary hearing be granted. The motion was denied.

It is generally conceded that identification testimony should be subject to the most careful scrutiny. Such testimony undeniably has a strong effect on juries, but, at the same time, the possibility of error is great. In

a case of this nature, where the conviction rests exclusively on identification testimony, it is highly prejudicial to put a defendant in the position of cross-examining a witness whom he is confronting for the first time.

Appellant asserts that under these facts, a preliminary hearing was necessarily incident to a fair trial. The denial of the preliminary hearing here was such as to preclude the defendant from preparing any effective cross-examination of these witnesses. The right to cross-examination of accusing witnesses is fundamental to our system of criminal justice, yet it was effectively diluted here. That the appellant was severely prejudiced by his lack of a preliminary hearing cannot be denied. The conviction should be reversed and the case remanded for a new trial and granting appellant a preliminary hearing. Blue v. United States, 342 F.2d 894, 119 U.S.App.D.C. 315 (1964); Dancy v. United States, U.S.Ct.of App. for Dist. of Col. Cir. No. 18,366, and No. 18716, Decided October 14, 1965, Modified February 11, 1966 (Slip opinion).

As previously discussed, four government witnesses identified appellant as being one of the robbers, three could not. In addition, Mrs. Garnes positively stated

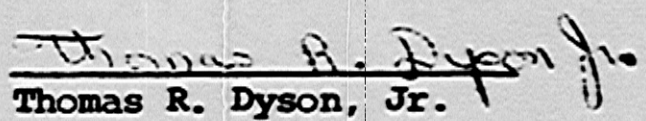
that appellant Belton was not one of the four men who entered her house minutes after the robbery had taken place. From this basic contradiction in the prosecution's testimony, it is difficult to believe that a jury could resolve beyond a reasonable doubt that appellant was a participant in the robbery. This is further pointed out by the jury's failure to convict appellant on the second count of the indictment which differed from the first count only in that money was taken from a different cash register.

Appellant submits that the lower court erred in denying appellant Belton's motion for a judgment of acquittal. Curley v. United States, 81 U.S.App. D.C. 389, 160 F.2d 229 (1947).

CONCLUSION

For all of the reasons set forth above, this Court should reverse the judgment of conviction and order the court below to enter a judgment of acquittal or in the alternative remand for a new trial.

Respectfully submitted,



Thomas R. Dyson, Jr.
500 Hill Building
839 17th Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was hand delivered to the U. S. Attorney's Office, United States District Courthouse Building, Washington, D. C., on March 31, 1966.

Thomas R. Dyson, Jr.

Thomas R. Dyson, Jr.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19755, 19756

DAVID BELTON, ROBERT L. GARNES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, JR.,
EDWARD T. MILLER,
Assistant United States Attorneys.

Cr. No. 559–65

QUESTIONS PRESENTED

(1) Were appellant Garnes' admissions obtained in violation of his right to counsel so that they should have been excluded from use at his trial? May he now raise this issue at all in the absence of prior objection?

(2) In the absence of objection at trial and therefore in the absence of adequate relevant inquiry, may appellant Garnes now challenge the validity of the warrant on which he was arrested on the basis of an alleged untruth contained in the affidavit on which it was based or on the basis of its alleged legal insufficiency? In any event, was the affidavit legally sufficient?

(3) Since appellant Belton was never arrested prior to his original indictment on the instant robbery charge, was he nevertheless entitled to a preliminary hearing?

(4) Where there was testimony which tended to controvert four witnesses' positive identification of appellant Belton as one of the robbers, was his guilt still a question for the jury? Does the fact that the jury found him guilty on only one of two similar robbery counts prevent the verdict from being sustained?

216-061—66——1

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19755, 19756

DAVID BELTON, ROBERT L. GARNES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A two-count indictment charging appellants David Belton and Robert L. Garnes with robbery was filed in the District Court on May 17, 1965. The first count of the indictment identified Mary Jordan as the victim of the robbery which occurred in March 26, 1965 at the Food Plaza supermarket located at 441 Chaplin Street, Southeast. The second count was identical except that it identified Carol Halfpap as the victim.

The record of trial discloses that four young Negro men armed with pistols held up and robbed the Food Plaza supermarket at 441 Chaplin Street, Southeast, just at nine p.m. closing time, March 26, 1965. Seven witnesses described the events which had occurred when two men brandishing pistols followed closely by two others, entered the store. While they held at bay the few persons who remained in the store, the first two who had entered took over seven hundred dollars from

two cash registers, and put at least some of it into a brown paper bag. (Tr. 11–12, 15–21.)

The narratives of these witnesses were in substantial agreement. In particular, they agreed that the first robber, who emptied the first cash register, which was Carol Halfpap's, was armed with a chrome plated pistol and wore a light tan carcoat with a brown fur collar. Some had seen him help rob the second register, Mary Jordan's, also. They saw the second man, who flourished a black automatic pistol and wore a black leather carcoat or jacket and a dark beret or "tam" type hat, rob the second register. (Tr. 12–14, 17, 50–52, 59, 69–73, 79–82, 103–105, 108, 110–111, 128–129.) Their descriptions of the third robber were less definite and the fourth apparently attracted little attention (Tr. 20, 35, 45, 54, 110–111, 139).

Five witnesses to the robbery positively identified appellant Garnes as the robber wearing the tan coat with the fur collar. Four witnesses positively identified appellant Belton as the robber who wore the black leather coat and dark beret. (Tr. 22–23, 37–40, 56–57, 84–85, 97, 99, 112–113, 121, 131–132, 146). Three checkers who handled the cash register were among those called as witnesses; Halfpap identified Garnes but not Belton. Jordan and Trittipoe identified neither at trial (Tr. 56–57, 75–76, 105).

The witnesses' identifications were corroborated by the testimony of other witnesses including that of appellant Garnes' father and stepmother, into whose house Garnes and three companions had rushed unexpectedly at a few minutes after nine on the night of the robbery. Clothing and certain other circumstances observed by the elder Garneses identified these visitors as the men described by the eye-witnesses to the robbery and the flight. (Tr. 153–158, 160–161, 169, 180–182, 184, 188, 193–194, 196–197, 200). Mrs. Garnes stated flatly, however, that appellant Belton was not the man in the black jacket who had accompanied her stepson that evening. But she was uncertain whether Belton had been in her home that night and her testimony as well as that of her husband showed a very limited opportunity to observe the faces of the three strangers and little exercise of what opportunity she had. (Tr. 158–159, 161, 170, 174–177, 181–182).

Robbery Squad Detective George William Dunphy testified that the following Monday, March 29, he had arrested Garnes on a warrant at the Washington Hospital Center, where he was being treated for a fractured jaw. Having secured permission from both the doctor on the floor and the doctor responsible for Garnes treatment to take him into custody and transfer him to D.C. General Hospital, Dunphy and his partner, Detective Louis Blancato, entered Garnes' room where he was lying on the bed, identified themselves as police officers, showed him the warrant and told him "that he was under arrest and that he didn't have to make any statements to us, that he didn't have to talk to us about this case whatsoever, and that he was entitled to talk to a lawyer at any time before speaking to us." (Tr. 209). On *voir dire* Dunphy described what then occurred as follows:

> We told him to get dressed. His clothes were in the room in a closet. While he was getting dressed, we asked him what part he had in the holdup. The defendant didn't say anything at first, continued to put his trousers on; then he looked up and he said, "Who blew the whistle on me? Who put me in?"
>
> We told him we weren't at liberty to divulge that information to him.
>
> He then said, "I took part in the holdup but I didn't do the shooting."
>
> Up until this point, neither myself nor Detective Blancato had mentioned that there was a shooting involved in this holdup.
>
> We asked him how much money did he get and he said that for his part of the holdup, he got $240.00.
>
> We then took the defendant from the floor and we called the precinct. No. 10 Precinct responded and sent a wagon and he was transported to D.C. General Hospital. (Tr. 209–10.)

In the course of his testimony, Dunphy stated that several hospital personnel had come in and out of the room while he and Blancato were there (Tr. 211). He also stated, and was not effectively controverted by Garnes, that except for the

fact that his jaw was wired, Garnes showed no adverse effects from his recent medical treatment and that he had even greeted Detective Blancato with "Don't you remember me? You arrested me before," when the two detectives had entered the room. (Tr. 211–213, 225–227, 244).

Dunphy reiterated his testimony regarding the admissions to the jury after the trial judge had ruled that the admissions were threshold statements voluntarily made after proper warning to the defendant of his constitutional rights to remain silent and to have counsel before making a statement (Tr. 238–239, 241–243). On cross-examination, Dunphy indicated that about fifteen minutes had elapsed after the two detectives obtained clearance from Garnes' doctor and the time they took him from the hospital (Tr. 214). On *voir dire* Dunphy also disclosed that Garnes had subsequently identified Belton as one of the participants in the robbery (Tr. 210–211).

After the close of the government's case, appellant Belton called an alibi witness, an entertainer, who testified that he had routinely spent Fridays and Saturdays with Belton and who claimed to have been continuously with him at a night-club on March 26 from eight p.m. until two a.m. (Tr. 248–249, 254). Appellant Garnes offered no evidence. Belton's motion for judgment of acquittal was denied (Tr. 272).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

Appellant Garnes' contention that use of his admissions at trial was in violation of his constitutional right to counsel is

not properly raised for the first time on appeal. But in any event the contention lacks merit because this Court has repeatedly rejected the inflexible rule he now urges upon it, which would exclude from evidence all statements made by suspects not made in the presence of counsel, regardless of circumstances. Moreover, applicable law clearly permits use of appellant's admissions obtained under the circumstances disclosed by the instant record. Here, appellant's initial responses to general police inquiries about his involvement in the as yet unsolved robbery were clearly made at the threshold after a full warning of his rights. They did not follow previous denials and were not the product of any unnecessary delay.

II

Because appellant Garnes did not challenge the validity of the warrant authorizing his arrest for robbery in the court below, he is precluded from raising it now for the first time on appeal. Because of this failure, no inquiry regarding the alleged defects in the warrant was conducted at trial, and the record now before this Court is insufficient for review of this issue. In addition, the government is now precluded from proving that there was sufficient probable cause to support a felony arrest regardless of whether the warrant itself was sufficient. Nonetheless, the affidavit, which included a detailed description of the robbery and the sources of Garnes' identification, adequately met the standards which have been established by the Supreme Court.

III

Appellant Belton had never been arrested on the instant robbery charge when the grand jury handed down its indictment. Though decisions by this Court have pointed out the incidental benefits of discovery which may accrue to an accused when he has assistance of counsel at a preliminary hearing conducted after his arrest, they do not give him an independent right to depose potential witnesses after an original indictment moots the primary issue of whether there is probable cause to hold him for the action of the grand jury.

216-061—66——2

IV

Four witnesses positively identified Belton at trial as one of the robbers of a certain supermarket. Consequently, if the evidence is viewed in the light most favorable to the government, the question of his participation was clearly for the jury, even though there were also three eyewitnesses to the robbery who did not identify him at trial and two witnesses whose testimony might have tended to prove he was not one of the robbers. Although the jury's verdict was divided on two similar counts, it was not irrational. Even if it were irrational, it should be sustained, since there was substantial evidence to support it, if the evidence is viewed in the light most favorable to the government.

ARGUMENT

I. Though use of appellant Garnes' admissions may not properly be challenged for the first time on appeal these threshold admissions, nevertheless, were properly admitted as evidence against him because they were not the product of delay and were made after appellant was warned fully of his rights.

(Tr. 207–211, 214, 224, 240–243)

Appellant Garnes now contends for the first time that certain admissions by him were obtained in violation of his right to counsel and therefore improperly used against him at trial. Since no such objection was raised at trial, it is doubtful whether this contention may properly be urged to be reversible error on appeal. *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F. 2d 743, *cert. denied*, 379 U.S. 840 (1964); *Williams* v. *United States*, 113 U.S. App. D.C. 7, 303 F. 2d 772, *cert. denied*, 369 U.S. 875 (1962).

The admissions to which appellant now objects were statements made at the time of his arrest to Detective George William Dunphy, and Louis Blancato who arrested appellant on a warrant in the course of their investigation of the robbery of the Food Plaza supermarket (Tr. 207–208, 240–241). Dunphy testified that when they finally received clearance from appellant's doctor, the detectives walked into appellant's hospital room, identified themselves as police officers, and informed

appellant that he was under arrest for the holdup. At that time, according to Dunphy, appellant was warned "that he did not have to make any statements to us, that he didn't have to talk to us about his case whatsoever, and that he was entitled to talk to a lawyer at any time before speaking to us." They told appellant to get dressed, and while he was getting dressed, they asked him what part he had in the holdup. According to Dunphy, Garnes did not respond at first, continued to put his trousers on, and then asked "Who blew the whistle on me? Who put me in?" He then admitted complicity in the holdup and that he received a part of the proceeds. (Tr. 209–210, 242–243.) At trial, Garnes denied both making the statements and receiving the warning (Tr. 224).

In effect appellant Garnes is asking this Court to adopt an inflexible rule that no statements or admissions to police officials made out of the presence of counsel, irrespective of the circumstances in which they are made, are to be received in evidence at trial. This Court has repeatedly rejected the invitation to adopt such a rule. *E.g., Jackson* v. *United States*, 119 U.S. App. D.C. 100, 337 F. 2d 136 (1964); *Long* v. *United States*, 119 U.S. App. D.C. 209, 338 F. 2d 549 (1964); see *Williams* v. *United States*, 120 U.S. App. D.C. 244, 345 F. 2d 733 (and separate opinion of Burger, J., *supra* at 247 n. 3, 345 F. 2d at 736 n. 3), *cert. denied*, 382 U.S. 962 (1965). And because this Court faced the identical issue in *Long, supra*, on nearly identical facts, that decision, we submit, is controlling here.[1] In the instant case, as in *Long*, appellant was given a full warning of his rights. See *Alston* v. *United States*, —— U.S. App. D.C. ——, 343 F. 2d 345 (1964) (opinion of McGowan, J.). There was no delay attributable to this initial questioning. See *Alston* v. *United States, supra* (opinion of

[1] Certainly no change in this flexible rule is propitious while the Supreme Court is considering further the application of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) in five pending cases: *California* v. *Stewart*, 382 U.S. 937 (1965) (No. 584), *granting cert.* in 43 Cal. Rptr. 201, 400 P. 2d 97; *Johnson* v. *New Jersey*, 382 U.S. 925 (1965) (No. 762), *granting cert.* in 43 N.J. 572, 206 A. 2d 737; *Miranda* v. *Arizona*, 382 U.S. 925 (1965) (No. 759), *granting cert.* in 98 Ariz. 18, 401 P. 2d 721; *Vignera* v. *New York*, 382 U.S. 925 (1965) (No. 760), *granting cert.* in 15 N.Y. 2d 970, 207 N.E. 2d 527; *Westover* v. *United States*, 382 U.S. 924 (1965) (No. 761), *granting cert.* in 342 F. 2d 684 (9th Cir.).

Bazelon, C. J.); *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F. 2d 962 (1964). The response clearly occurred at the "threshold" while appellant was dressing to leave the hospital and therefore was admissible. *United States* v. *Mitchell*, 322 U.S. 65 (1944); *Ramey* v. *United States*, *supra*. Indeed, the record shows that only fifteen minutes elapsed between the time the officers obtained the doctor's clearance to arrest and transfer him to D.C. General hospital and the time they actually left the hospital with appellant (Tr. 214). As in *Long*, furthermore, appellant never denied complicity. In fact, his initial response appears to have been more that of curiosity when confronted with the fact that he had been discovered than of confession.

Past decisions of the Court have recognized the need for some police questioning of suspects under appropriate circumstances and have approved such interrogation. *E.g.*, *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); see *Alston* v. *United States*, *supra* (opinion of McGowan, J.); cf. *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957). In the instant case, the police were still trying to solve the robbery, for apparently they still did not know that Belton was one of the holdup men (Tr. 210–211). The circumstances of the instant case are clearly distinguishable, therefore, from those in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3rd Cir., 1965), where there was not only extended interrogation of a suspect who was not assisted by counsel and not fully in control of his faculties, but where the police were in possession of so much evidence against the suspect that their questioning could have been for no purpose other than to elicit a confession to be used as evidence against him. Cf. *Spano* v. *New York*, 360 U.S. 315 (1959). Dunphy also testified that a number of hospital personnel entered and left appellant's room while the officers were there (Tr. 211). As a result of all of these circumstances, the inquiry addressed to appellant in the instant case never had any of the aspects of secret police interrogation which have troubled this Court. Cf. *Ricks* v. *United States*, 118 U.S. App. D.C. 216, 334 F. 2d 964 (1964). And

in the absence of the slightest intimation of coercion, overreaching, or any other impermissible influence, the admission of testimony describing appellant's admissions was, appellee submits, entirely proper.

II. The validity of the warrant for Garnes' arrest should not be subject to initial challenge on this appeal, but, notwithstanding, it clearly showed probable cause by describing in detail the crime charged and the reliable sources of information incriminating him.

(Tr. 22–23, 29–30, 36)

Appellant Garnes did not challenge the validity of the warrant authorizing his arrest either before or during trial. He is therefore precluded from raising it now. See *Stith* v. *United States,* No. 19520, D.C. Cir., April 22, 1966; *Scott* v. *United States,* 115 U.S. App. D.C. 208, 317 F. 2d 908 (1963). Sidney Hudes, the manager of the supermarket who was an eyewitness to the robbery, identified Belton and Garnes as two of the robbers at trial. He testified, however, in contradiction of Detective Dunphy's sworn warrant affidavit, that he had never identified either defendant from pictures at any prior time (Tr. 22–23, 29–30, 36). But because the validity of the warrant was never in issue at trial, no inquiry was made to ascertain the reasons for the apparent conflict now cited by appellant between Detective Dunphy's statement in his affidavit and Hudes' contradictory statement at trial.[2] The record, therefore, is inadequate for proper consideration of this issue on this appeal.

It is also doubtful whether this attack based on the alleged untruthfulness of statements in the affidavit is open to appellant at all. *Kenney* v. *United States,* 81 U.S. App. D.C. 259,

[2] The pertinent section in Detective Dunphy's affidavit, which also described the robbery and the role of Hudes and Trittipoe as witnesses, reads as follows:

"Reliable information received by the undersigned Detective Sergeant that the above subject, Robert Lee Garnes, was one of the subjects involved in this holdup. This information received on Saturday evening, March 27, 1965. Photographs of this subject were shown to the above complainant, Sidney Hudes and Pat H. Trittipoe, and subject Garnes was positively identified as being one of the negro males who held up the above market."

157 F. 2d 442 (1946); *United States* v. *Gianaris*, 25 F.R.D. 194 (D.C.D.C. 1960). But the mere existence of the contradiction without more is in any event clearly no proper basis for an allegation that Dunphy swore falsely in the affidavit and that the warrant is consequently invalid.

In addition, appellant's failure to raise this issue has foreclosed the government from conveniently ascertaining, as it properly might have, whether the arresting officer had sufficient probable cause for the felony arrest, apart from what is set forth in the warrant, should the warrant as drafted be held insufficient. See *Giordenello* v. *United States*, 357 U.S. 480 (1958); *United States* v. *White*, 342 F. 2d 379 (4th Cir. 1965); see also *Rabinowitz* v. *United States*, 339 U.S. 56 (1950).

The affidavit on which this warrant was based includes both (1) a detailed narrative of the robbery with which appellant is charged and (2) identification of two specific persons described as eyewitnesses as the source of the directly incriminating information. In addition, a reliable source of information is also cited and the basis for crediting it, that is, the subsequent identification of pictures by the eyewitnesses, is described.[3] The affidavit, thus, more than meets the standards set forth in *Jaben* v. *United States*, 381 U.S. 214, 223 (1965), and suffers from none of the deficiencies of the warrant condemned in *Aguilar*.[4] See *United States* v. *Ventresca*, 380 U.S. 102 (1965).

III. Appellant Belton was not entitled to a preliminary hearing solely for the purpose of deposing the government's witnesses, when the grand jury's indictment had mooted the issue of whether there was probable cause to hold him for its action.

Appellant Belton was never arrested for the robbery charged in this case. Rather, an original indictment was handed down

[3] From the way Detective Dunphy's affidavit was drafted, it is quite possible to conclude in the alternative that he relied primarily upon the identification by the named eyewitnesses and cited the informant to show what caused his selection of Garnes' picture for their scrutiny.

[4] The warrant condemned in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) is readily distinguishable from that in the instant case, because it was merely conclusory, it depended wholly upon information received from an unidentified informant, and disclosed no underlying source for belief in the informant's reliability.

by the grand jury on May 17, while he was serving a sentence for an unrelated offense. He had been in jail for the first part of the month previous to his indictment because he had been unable to make bond on another unrelated charge.[5] A motion for a preliminary hearing, filed July 19, was argued and denied on July 30. Using this Court's decisions in *Blue*[6] and *Dancy*[7] as his authority, Belton now asserts that this denial so prejudiced him that any possibility of a fair trial was removed.

Neither *Blue* nor *Dancy*, while citing important incidental benefits of discovery which may accrue to an accused when he has the assistance of counsel at a preliminary hearing, bestows upon appellant an independent right to a preliminary hearing solely for the purpose of deposing the government's witnesses, when the issue of probable cause to hold him has been mooted by indictment. Therefore, regardless of whatever advantages might conceivably have been gained by appellant during a preliminary hearing, he was not entitled to one because he was not arrested in a manner which initiates the procedural steps set out in Fed. R. Crim. P. 5. *Crump* v. *Anderson*, —— U.S. App. D.C. ——, 352 F. 2d 649 (1965); *Godfrey* v. *United States*, —— U.S. App. D.C. ——, 353 F. 2d 456 (1966); see *Jaben* v. *United States*, 381 U.S. 214 (1965), *cf. Hairston* v. *United States*, No. 19594, D.C. Cir., March 31, 1966

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[5] Appellant Belton was indicted simultaneously with appellant Garnes on the two robbery counts May 17, 1965. He was given a copy of the indictment the following day. The record shows that Belton received continuous assistance of counsel immediately thereafter until his retained counsel entered his appearance June 29. Belton had not made the $1,500 bond set when he was held April 13 for action of the grand jury on an unrelated charge, Cr. No. 560–65. And on April 28 he began to serve a 60-day sentence in the D.C. Jail for a traffic offense, D.C. Court of General Sessions, Traffic No. 9934–65.

[6] *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F. 2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965).

[7] *Dancy* v. *United States*, Nos. 18,366 and 18,716, D.C. Cir, decided October 14, 1965, modified February 11, 1966.

IV. Whether the four positive identifications of appellant should be believed, despite some contradictory testimony, was a question for the jury whose proper verdict should be sustained.

(Tr. 49–52, 59, 69–73, 103–04, 158–159, 161, 170, 174–177, 262, 279–80, 285)

Four witnesses positively identified appellant Belton as one of the four men who robbed the Food Plaza on Chaplin Street on March 26, 1965. He argues, however, that because the three cashiers who were witnesses at trial, including Jordan and Halfpap, did not identify him as one of the robbers and because his alibi witness and Mrs. Garnes, whose testimony was inconclusive, tended to contradict the validity of the identification, his motion for acquittal should have been granted. (Tr. 158–159, 161, 170, 174–177, 262).

Resolving these conflicts in testimony was the duty of the jury. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 331 U.S. 837 (1947); *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954). The jury was given both an identity instruction and an alibi instruction (Tr. 279–80). Its verdict must be sustained if there is substantial evidence, as there was, taking the view most favorable to the Government to support it. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert. denied*, 324 U.S. 875 (1945); see *Jones* v. *United States*, No. 19,541, D.C. Cir., April 28, 1966.

There is at least one plausible explanation for the divided verdict as to Belton. Some of the testimony suggested that Belton had gone directly to the second cash register, run by Halfpap, where he had been assisted by Garnes, and had not participated in the robbery at the first register (Tr. 49–52, 59, 69–73, 103–04). The judge instructed the jury to consider the evidence as to each count with respect to each defendant (Tr. 285). This, apparently, they did. In any event "rational consistency in a jury's verdict on each of several counts is not necessary," even assuming *arguendo*, that the jury's verdict with respect to Belton was not rationally consistent. *Silverman* v. *United States*, 107 U.S. App. D.C. 144, 275 F. 2d 173 (1960), *reversed on other grounds*, 365 U.S. 505 (1961).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, Jr.,
EDWARD T. MILLER,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1966

REPLY BRIEF
FOR APPELLANT GARNES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19755 and 19756
(Consolidated)

DAVID BELTON and
ROBERT L. GARNES,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant Garnes
(Appointed by this Court)

May 5, 1966.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19755 and 19756
(Consolidated)

DAVID BELTON and
ROBERT L. GARNES,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT GARNES

I. Right to Assistance of Counsel

At the outset, the Government has challenged appellant Garnes' right to claim on appeal that his incriminating statements were admitted in evidence in violation of his constitutional right to the assistance of counsel. The Government's position is based upon the fact that no express objection on this ground was made at the trial. It will be recalled, however, that Judge Corcoran held a separate hearing to consider fully the admissibility

of the statements in question. At the conclusion of that hearing, Judge Corcoran made specific findings of fact, which read in pertinent part as follows:

> ". . . [I]t is the finding of this Court that at the time the Officers visited Garnes at the Washington Hospital Center to effect his arrest that they were in possession of a valid arrest warrant; that at the time they executed the warrant they advised the defendant of his Constitutional rights to remain silent and of his right to have counsel before making a statement; that such admissions as were made at that time by the defendant Garnes were voluntarily made and . . . accordingly, as a matter of law, must be deemed as admissible in evidence against the defendant Garnes. . . ." (Tr. 238-239.) (Emphasis supplied.)

From the foregoing, it is apparent that Judge Corcoran must have considered the fact that appellant was questioned in the absence of counsel, and must have concluded (erroneously, appellant submits) that since the police had first warned appellant of his right to the assistance of counsel, his subsequent interrogation did not violate that constitutional right. It appears clear, therefore, that the right to counsel question was considered by the court below and is thus properly before this Court on appeal.

In any event, it seems beyond dispute that the admission into evidence of a confession obtained in violation of appellant's constitutional rights constitutes "plain error" that can and must be corrected by this Court on appeal, pursuant to Rule 52(b), Fed. Rul. Crim. Proc. Indeed, both of the cases cited by the Government (Ramey v. United States, 118 U.S. App. D. C. 355, 336 F.2d 743 (1964), cert. den. 379

U.S. 840, and Williams v. United States, 113 U.S. App. D. C. 7, 303 F.2d 772 (1962), cert. den. 369 U.S. 875) expressly indicate that the "plain error" rule can properly be invoked in a case such as this. Accordingly, if this Court is of the view that the right to counsel point was not properly before the court below, appellant vigorously contends -- for the reasons set forth in his opening brief -- that the trial judge committed "plain error" in admitting the incriminating statements into evidence.

On the merits, the Government erroneously characterizes appellant's argument as a request for an inflexible rule that any statements or admissions made to the police outside the presence of counsel are inadmissible. As our opening brief makes clear, appellant's position is that under the circumstances of this case, including the fact that appellant was arrested pursuant to a warrant and that the police interrogation obviously was designed to elicit a confession from him, appellant was entitled to the assistance of counsel at the time he was questioned. Escobedo v. Illinois, 378 U.S. 478 (1964). The statements obtained from him in the absence of counsel thus were not admissible against him.

The Government's reliance upon Long v. United States, 119 U.S. App. D. C. 209, 338 F.2d 549 (1964) is totally misplaced. That case did not even involve police interrogation. Rather, the defendant there had volunteered a confession before the police were able to identify themselves, and there is no indication whatever that he had ever been

subjected to interrogation designed to obtain a confession from him. The Long case, and others like it, are of no relevance whatever here. It is the rule of Escobedo that controls.

II. Invalidity of Arrest Warrant

The Government completely misconceives the nature of appellant's argument regarding the validity of the arrest warrant. Appellant is not here challenging the truthfulness of Detective Dunphy's affidavit. Rather, appellant's position is that, even assuming the affidavit to have been truthful, it nevertheless was insufficient to permit the U. S. Commissioner to make a proper finding of "probable cause" for the arrest. Certainly the reference to an unidentified informant, without more, is completely insufficient under the decision in Aguilar v. Texas, 378 U.S. 108 (1964). As the Aguilar case makes clear, the affidavit must contain some information showing the basis for the informant's conclusions (see pp. 20-21, opening brief), and the instant affidavit contains no such information.

As for the assertion that "positive identification" had been obtained, the affidavit is devoid of information from which the Commissioner might determine that the affiant was personally familiar with the identification or that he was justified in relying upon it. When the Commissioner is presented with a warrant such as this one, he is in effect asked to serve as a rubber stamp for the police. He is told that there has been "positive identification," but he is not told who obtained

it, or whether the affiant had personal knowledge of it. Surely, the Aguilar case demands that a magistrate be supplied with more information regarding the affiant's own participation in the identification process, or regarding his own knowledge of the facts recited, before the standards for finding "probable cause" can be satisfied. Nothing in United States v. Ventresca, 380 U.S. 102 (1965), or Jaben v. United States, 381 U.S. 214 (1965), is to the contrary. Moreover, see Riggan v. Virginia, ___ U.S. ___, 34 U. S. Law Week 3376 (dec. May 2, 1966), in which the Supreme Court held invalid, on the basis of Aguilar, a warrant obtained upon recitals of "personal observation of the premises" by the affiant police officer and "information from sources believed by the police department to be reliable."

Respectfully submitted,

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant Garnes
(Appointed by this Court)

CERTIFICATE OF SERVICE

I, Jerome B. Libin, counsel for appellant Garnes (appointed by this Court) hereby certify that on May 5, 1966, I served the foregoing Reply Brief for Appellant Garnes on counsel for appellant Belton, Thomas R. Dyson, Jr., Esquire, 839 - 17th Street, N. W., Washington, D. C., and on counsel for appellee, Assistant United States Attorney Edward T. Miller, United States Court House, Washington, D. C., by causing a copy thereof to be delivered to each of them at their respective addresses.

Jerome B. Libin

PETITION FOR
REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19756

ROBERT L. GARNES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

June 15, 1966.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19756

ROBERT L. GARNES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

PETITION FOR REHEARING EN BANC

This petition for rehearing en banc is filed because the decisions of the Supreme Court in Miranda v. Arizona, Vignera v. New York, Westover v. United States and California v. Stewart, ___ U. S. ___ (decided June 13, 1966), now make it clear beyond doubt that the incriminating statements made by appellant in response to police interrogation following his arrest were improperly admitted into evidence against him, and that for such reason his conviction must be reversed. Miranda flatly holds that such

statements obtained from a suspect through "custodial interrogation" by the police may not be admitted in evidence against him unless (1) the suspect was given a four-point warning of his constitutional right to remain silent and to have the assistance of counsel, and (2) the suspect then affirmatively waived those rights and agreed to talk.

The relevant facts of the instant case are as follows:

On March 29, 1965, appellant was arrested in his room at the Washington Hospital Center, where he was recuperating from an operation performed that morning on his fractured jaw. His arrest was made pursuant to a warrant that charged him with participation in the robbery of the Food Plaza, Inc., in violation of D. C. Code § 29-2201. Shortly before the arrest, the physician in charge of appellant's case had authorized his release from the hospital only on the understanding that appellant would be taken to D. C. General Hospital, "because he needed more hospital treatment." (Tr. 209.) Detective Dunphy of the Metropolitan Police Robbery Squad and his partner, Detective Blancato, then entered appellant's room at about 3:00 p.m., served him with the arrest warrant, and advised him "that he didn't have to make any statements to us, that he didn't have to talk to us about this case whatsoever, and that he was entitled to talk to a lawyer at any time before speaking to us." (Tr. 209.) Appellant was then told to get dressed. Before he had even finished getting dressed, however, appellant was questioned

regarding his participation in the robbery. Specifically, he was asked "what part he had in the holdup," "how much money did he get," and "who else was involved in the holdup." (Tr. 209-210, 243.) Appellant, whose jaw was wired, apparently made incriminating statements in response to the questions that were put to him. (Tr. 209-210, 242-243.) (Appellant, on the other hand, denied receiving any warning of his rights or having said anything other than, "I told him I didn't know what he was talking about." (Tr. 223-224.))

At the trial, held in August 1965, the Government sought to introduce appellant's incriminating statements in evidence. Before the statements were introduced, however, a full hearing was held on the circumstances surrounding the interrogation, with testimony given by Detective Dunphy and by appellant. (Detective Blancato was unable to testify, but defense counsel stipulated that his testimony would corroborate that of Detective Dunphy.) At the conclusion of the hearing, Judge Corcoran rendered the following findings of fact and conclusions of law regarding the statements in question:

> "In view of that stipulation and the testimony of Detective Dunphy and the defendant Garnes, it is the finding of this Court that at the time that the Officers visited Garnes at the Washington Hospital Center to effect his arrest that they were in possession of a valid arrest warrant; that at the time they executed the warrant they advised the defendant of his Constitutional rights to remain silent and of his right to have counsel before making a statement; that such admissions as were made at that time by the defendant Garnes were voluntarily made and were not the result of force or duress or pressure

> of any kind exerted upon him by the Officers; and the admissions accordingly fall into the category of threshhold statements voluntarily made and, accordingly, as a matter of law, must be deemed as admissible in evidence against the defendant Garnes; not, of course, binding upon the defendant Belton who was not present at the time." (Tr. 238-239.)

The jury was then recalled, and Detective Dunphy repeated his version of the facts to them. (Tr. 240-245.) Appellant, who did not take the stand before the jury, was convicted on two counts of robbery, and was given concurrent sentences of 3 to 9 years on each count.

Appellant argued on appeal that the constitutional principles enunciated by the Supreme Court in Escobedo v. Illinois, 378 U. S. 478 (1964), must take precedence over the McNabb-Mallory rule (with its so-called "threshold" confession exception) in judging the admissibility of incriminating statements obtained from an accused, and that application of those principles here required a holding that appellant's statements were not admissible against him. The Government responded by arguing that (1) since no formal objection on Escobedo grounds had been made below, the issue was not properly before this Court on appeal, and (2) in any event, prior decisions of this Court have consistently upheld the admissibility of so-called "threshold" confessions and nothing in Escobedo suggested a contrary result. Appellant's reply brief stressed the fact that even though there was no express, formal objection below, the issue must have been considered by the trial judge and thus was properly before the Court on appeal,

and that, in any event, the admission into evidence of an unconstitutionally obtained confession was "plain error" within the meaning of Rule 52(b), Fed. Rul. Crim. Proc.

Appellant's appeal was consolidated with that of his co-defendant, Belton, and on May 19, 1966, oral argument in the consolidated case was presented to a division of this Court consisting of Senior Judge Edgerton and Judges Danaher and Burger. On May 31, 1966, appellant's conviction was summarily affirmed, the division issuing only a one-sentence judgment that stated, in pertinent part, "there is no error affecting substantial rights."

The recent holding of the Supreme Court in Miranda and its companion cases now crystallizes the arguments that appellant here advances as the basis for this petition for rehearing. First, it is clear that the warning appellant received from the police (containing only one of the four essential elements spelled out in Miranda) was constitutionally inadequate, thus making his interrogation improper and the fruits thereof inadmissible in evidence against him. Second, even if the four-point warning requirement set forth in Miranda is to be applied prospectively only, it is nevertheless clear that the principles of Escobedo, as amplified in Miranda, were directly applicable to appellant's interrogation. Since appellant thus had both a constitutional right to remain silent and a constitutional right to the assistance of counsel at his interrogation, the only valid question for consideration -- one the division showed no signs

of considering -- is whether appellant can be said to have affirmatively waived those rights in briefly responding to the police under the circumstances of this case. If not, his statements should have been ruled inadmissible.

Both questions set forth above are properly before this Court at this time. The adequacy of appellant's warning may be considered by this Court even though no express objection was raised below, for the same reason that the admissibility of the confession in the Westover case was considered by the Supreme Court itself. As the Court there stated:

> "The failure of defense counsel to object to the introduction of the confession at the trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in Escobedo and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim. [Citations.]" (Miranda v. Arizona, Slip Op. 57, n. 69.)

If the Supreme Court was free to consider all aspects of the admissibility of Westover's confession because his trial was held before the decisions in both Escobedo and Miranda, this Court is now surely free to consider the adequacy of appellant's warning in light of the new rules set forth in Miranda, since appellant's trial was held before the decision in that case.

Whether appellant waived his rights may also be considered by this Court for similar reasons. Although it is true that appellant's trial was held subsequent to the decision in Escobedo,

intervening decisions of this Court had made it clear that so-called Escobedo objections would not be considered meritorious in this Circuit unless the facts of the case were identical with, or at least quite similar to, the facts of the Escobedo case itself. (See Jackson v. United States, 119 U. S. App. D. C. 100, 337 F.2d 136 (1964), cert. den. 380 U. S. 935, and Williams v. United States, 120 U. S. App. D. C. 244, 345 F.2d 733 (1965), cert. den. 382 U. S. 962 (see particularly concurring opinion of Burger, J.).) Only now, with the Miranda decision spelling out in full the intended constitutional scope of Escobedo, has an argument (or a trial objection) based on appellant's theory actually become "available" in this Circuit in any meaningful sense. Thus, by the same reasoning that permits consideration of the adequacy of appellant's warning, the waiver question is properly before this Court. Moreover, as appellant argued to the division, a full hearing was held on the admissibility of appellant's statements, and Judge Corcoran obviously concluded that since appellant had been given some warning of his constitutional rights, no further inquiry on constitutional grounds was necessary. Thus, although it might be asserted that no express, formal objection on each and every ground had been made below, it nevertheless seems clear that the question was considered by the trial court, and thus is properly here on appeal. Finally, as has been stated, appellant believes the admission into evidence of an unconstitutionally obtained confession is "plain error," within the meaning of Rule 52(b), Fed. R. Crim. Proc.

On the merits, little time need be spent pointing out that the warning given to appellant was constitutionally inadequate under the rules set forth in Miranda. As the Supreme Court has now made clear, any "custodial interrogation" (defined to encompass questioning by the police "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," (Miranda, Slip Op. 6)), must be preceded by a warning containing the following elements:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (Id.)

Here, the record is clear that appellant's warning consisted only of a statement that he had a right to remain silent and a right to talk to an attorney before answering any questions. He was not told (1) that anything he said may be used as evidence against him, (2) that his right "to talk to a lawyer" meant a right to have counsel present at his interrogation, or (3) that his right to counsel included a right to have one appointed for him if necessary. Accordingly, it seems clear beyond question that the police warning given to appellant was constitutionally inadequate, and that his subsequent interrogation was thus improper. As the Court stated in Miranda:

> "As with the warning of the right to remain silent and that anything stated can be used in evidence against him, this warning of the suspect's right to

the presence of counsel] is an absolute prerequisite to interrogation." (Miranda, Slip Op. 33.) (Emphasis added.)

If for some reason the four-point warning requirement is to be given prospective effect only,*/ there nevertheless remains the question whether appellant's interrogation was proper within the meaning of Escobedo as explained in Miranda. As appellant argued in his brief filed with the division, Escobedo was intended to make it clear that whenever a suspect had become the "focus" of a police investigation and has been subjected to interrogation for the purpose of obtaining a confession, both his privilege against self-incrimination and his constitutional right to the assistance of counsel attached, and any statements obtained from him would be admissible in evidence only if it could be established that he had affirmatively waived those rights. In light of the intervening decisions of this Court referred to above, as well as the decision in Kennedy v. United States, ___ U. S. App. D. C. ___, 353 F.2d 462 (1965), it was perhaps not surprising to find the division summarily rejecting appellant's argument and adhering to the so-called "threshold" confession exception that had been carved out of the Mallory line of cases.

However, the Miranda case now makes it apparent that Escobedo itself clearly applied to appellant's interrogation in the instant case. As Miranda states, "[taking] a person . . . into custody or

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*/ Some further indication of the Supreme Court's view on this point may be forthcoming when it decides Johnson v. New Jersey, now pending before it as Docket No. 762.

otherwise [depriving him] of his freedom of action in any significant way" (here, by arresting him pursuant to a warrant) "is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." (Miranda, Slip Op. 6 and id., n. 4.)

Next, Miranda makes it equally clear that the Escobedo case was intended to insure to the accused his right to the assistance of counsel when interrogated for confession-seeking purposes. As the Court stated in Miranda:

> "A different phase of the Escobedo decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. . . . The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege." (Miranda, Slip Op. 27-28.)

Even under Escobedo alone, therefore, the only remaining question here is whether appellant can be said to have waived his constitutional rights in light of the circumstances surrounding his interrogation. At the very least, appellant is now entitled to a full consideration of his contention on this point.

As appellant argued in his opening brief, no "knowing and intelligent" waiver of his rights can be found under the circumstances of this case. Appellant's interrogation began before he could even finish getting his clothes on, at a time when he was clearly in need of further medical treatment. His failure to make an express request for counsel and his replies to the questions put to him can hardly be

considered an affirmative and articulated waiver of his constitutional rights. (See Miranda, Slip Op. 32, 37-38.) Moreover, the burden for establishing such a waiver rests squarely on the Government and no showing of waiver has been made by it. The Supreme Court's observation on this point in Miranda is directly pertinent here:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self- incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U. S. 478, 490, n. 14." (Miranda, Slip Op. 37.)

In light of the foregoing, appellant respectfully requests that this petition for rehearing en banc be granted. The summary action of the division is clearly contrary to the decisions of the Supreme Court, first in Escobedo, and now in Miranda. Moreover, the extent to which those decisions will now be applied to pending cases in this Circuit is a matter of major importance requiring the attention of the full Court, en banc.

Respectfully submitted,

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for rehearing en banc was served on appellee on June 15, 1966, by delivery of a copy thereof to Edward T. Miller, Assistant United States Attorney for the District of Columbia, United States Court House, Washington, D. C.

Jerome B. Libin

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF COUNSEL
UNDER RULE 26

I hereby certify that the foregoing petition for rehearing en banc is presented in good faith and not for delay.

Jerome B. Libin

Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19756

ROBERT L. GARNES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

March 18, 1966.

STATEMENT OF QUESTIONS PRESENTED

1. Whether incriminating statements made by appellant were improperly admitted into evidence in violation of his Sixth Amendment rights, since the statements were made in response to police interrogation conducted at a time when appellant did not have the assistance of counsel.

2. Whether appellant was arrested pursuant to an invalid warrant, with any statements obtained from him immediately following his arrest thus inadmissible against him as the fruits of an illegal arrest.

INDEX

TABLE OF AUTHORITIES

CASES:

*Cases or authorities chiefly relied upon are marked by asterisks.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES:

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES CCURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19756

ROBERT L. GARNES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the
United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On May 17, 1965, appellant was indicted on two counts of robbery in violation of D. C. Code § 29-2201. He and a co-defendant, David Belton, were tried jointly in the United States District Court for the District of Columbia, before Judge Howard F. Corcoran and a jury. Appellant was convicted on both counts, and was given concurrent sentences of 3 to 9 years on each count. On October 22, 1965, Judge Corcoran entered an order authorizing appellant to prosecute on appeal without prepayment of costs, and notice of appeal

was filed on that day. This Court has jurisdiction upon appeal to review the judgment of the District Court under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On Friday night, March 26, 1965, at approximately 9:00 p.m., the Food Plaza, Inc., located at 441 Chaplin St., S. E., Washington, D. C., was held up by a group of four men.

The following Monday, March 29, Detective George Dunphy of the Metropolitan Police Robbery Squad obtained a warrant from the United States Commissioner for the arrest of appellant Robert L. Garnes. Issuance of the warrant was based on an affidavit signed by the detective, which stated, in pertinent part:

> "Reliable information received by the undersigned Detective Sergeant that the above subject, Robert Lee Garnes, was one of the subjects involved in this holdup. This information received on Saturday evening, March 27, 1965. Photographs of this subject were shown to the above complainant, Sidney Hudes [manager] and Pat H. Trittipoe [cashier], and subject Garnes was positively identified as being one of the negro males who held up the above market."

On that same day, March 29, Detective Dunphy and his partner, Detective Louis Blancato, went to the Washington Hospital Center, where appellant Garnes was being treated for a fractured jaw. Appellant had undergone an operation on his jaw that morning, and following the operation his jaw had been wired. (Tr. 212, 227.)

The detectives arrived at the hospital at about 12:25 p.m., spoke with a Dr. Peikin, and were told that before making the arrest,

they should speak further with a Dr. Wrightman, who was in charge of appellant's case. (Tr. 208.) Dr. Wrightman arrived at the hospital at approximately 3:00 p.m., and told the detectives that he would authorize appellant's release "if he could be transported to another hospital because he needed more hospital treatment." (Tr. 209.) The detectives assured Dr. Wrightman they would take appellant to D. C. General Hospital, where he could be kept under police custody. (Tr. 209.) The detectives then entered appellant's hospital room, presented him with the warrant, informed him that he was under arrest, and instructed him to get dressed.

A conflict exists as to what transpired in appellant's hospital room at the time of his arrest. According to Detective Dunphy, appellant was advised that he did not have to make any statements, and that he was "entitled to talk to a lawyer at any time before speaking to us." (Tr. 209.) According to appellant, the police officers did not advise him of his right to remain silent or of his right to contact a lawyer. "They did not advise me of anything." (Tr. 224.)

While getting dressed, appellant was subjected to a series of questions regarding his participation in the robbery. According to Detective Dunphy, he was asked, inter alia, "what part he had in the holdup," and "how much money did he get." (Tr. 209-210.) Appellant was said to have made incriminating statements in response to these questions, although he denied having said anything other than, "I told him I didn't know what he was talking about." (Tr. 209-210, 223.)

When appellant finished dressing, he was ushered from the hospital, placed in a patrol wagon and taken to D. C. General Hospital, where he remained until April 8. (Tr. 210.) On that day, he was released and taken to police headquarters for processing. He remained in jail overnight, and the following morning, April 9, was presented before the U. S. Commissioner. On May 17, appellant was indicted on two counts of robbery, in violation of Sec. 29-2201 of the D. C. Code, and on August 18, appellant was brought to trial.

During the course of the trial, Sidney Hudes, manager of the Food Plaza, identified appellant in the courtroom as one of the participants in the robbery. (Tr. 22.) However, on cross-examination, Hudes indicated that he had not previously identified appellant by photograph. (Tr. 29-30, 36.)

Also during the course of the trial, Judge Corcoran dismissed the jury and heard the testimony of Detective Dunphy and appellant regarding the circumstances surrounding appellant's arrest. (Tr. 205-229.) (Detective Blancato was unable to testify, but defense counsel stipulated that he would corroborate the testimony of Detective Dunphy. (Tr. 236, 238.)) After the hearing, Judge Corcoran made the following findings:

> "In view of that stipulation and the testimony of Detective Dunphy and the defendant Garnes, it is the finding of this Court that at the time that the Officers visited Garnes at the Washington Hospital Center to effect his arrest that they were in possession of a valid arrest warrant; that at the time they executed the warrant they advised the defendant of his Constitutional rights to remain silent and of his right to have counsel before making a statement; that such admissions as were made at that time by the defendant Garnes were voluntarily made and were not the

result of force or duress or pressure of any kind exerted upon him by the Officers; and the admissions accordingly fall into the category of threshhold statements voluntarily made and, accordingly, as a matter of law, must be deemed as admissible in evidence against the defendant Garnes; not, of course, binding upon the defendant Belton who was not present at the time." (Tr. 238-239.)

The jury was then recalled, and Detective Dunphy repeated his version of the facts to them. (Tr. 240-245.) Appellant did not take the stand before the jury.

Appellant was convicted on both counts of robbery, and was given concurrent sentences of 3 to 9 years on each count. This appeal followed.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U. S. Const., Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Rule 52(b), Federal Rules of Criminal Procedure:

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

I. Incriminating statements made by appellant in response to police interrogation conducted immediately following his arrest should not have been admitted in evidence against him, since they were obtained in violation of his constitutional right to the assistance of counsel.

II. Appellant was arrested pursuant to an invalid warrant, and the statements made by him immediately following his arrest were inadmissible as a matter of law, as the fruits of an illegal arrest.

SUMMARY OF ARGUMENT

I.

Incriminating statements made by appellant in response to police interrogation conducted in his hospital room immediately following his arrest, were not admissible in evidence because obtained at a time when appellant was entitled to, but did not enjoy, the assistance of counsel. When appellant was arrested at the Washington Hospital Center pursuant to a warrant, it is clear that the police process had begun to focus on him. When he was asked such questions as "what part he had in the holdup" and "how much money did he get," he was unquestionably being interrogated for the purpose of obtaining a confession. Accordingly, under the principles of Escobedo v. Illinois, 378 U. S. 478 (1964), appellant was entitled to the assistance of counsel during the interrogation, and no statements made by him in the absence of counsel were admissible in evidence against him. There is no difference under Escobedo between interrogation on the "threshold" of arrest and interrogation at the station house, where, as here, the arrest is made pursuant to a warrant.

Nothing in the record suggests that appellant in any way waived his rights during the interrogation. While appellant was apparently given a police warning and did not affirmatively request a lawyer, the circumstances surrounding the interrogation clearly show that he did not "intelligently and understandingly" waive his right to the assistance of counsel.

II.

Appellant's arrest was made pursuant to an invalid warrant, and thus was illegal. The warrant was based on an affidavit, signed by Detective Dunphy of the Metropolitan Police Robbery Squad, which stated, in pertinent part, that "reliable information [had been] received" regarding appellant's participation in the robbery, and that, after photographs of appellant had been shown to the store manager and a cashier, appellant had been "positively identified" as a participant. Under the decision in Aguilar v. Texas, 378 U.S. 104 (1964), it is clear that a warrant cannot be obtained upon a mere assertion that "reliable information" has been received. As the Court there stated, the issuing magistrate must be informed of the underlying details on which such an assertion is based, so that he can exercise his own independent judgment on the question of probable cause and not act merely as a "rubber stamp" for the police.

The only possible basis on which the instant warrant can be supported, therefore, is the separate assertion that appellant was "positively identified" by photograph. But the same vice contained in the "reliable information" statement is present here. Absent further details, the magistrate must rely only on the policeman's word that identification was made. Without additional information in support of that bare assertion, the magistrate has nothing on which to exercise his independent judgment and can act only as a rubber stamp for the police. The significance of this fact was highlighted at the trial,

when the store manager stated on cross-examination that he never had identified appellant by photograph.

Since the warrant for appellant's arrest was thus invalid, it is clear under the principles of Wong Sun v. United States, 371 U. S. 471 (1962), that the statements obtained from him in his hospital room should have been excluded from evidence as a matter of law, as the fruits of an illegal arrest. The trial judge's failure to exclude the statements on this ground constituted "plain error," within the meaning of Rule 52(b), Fed. Rules Crim. Proc.

ARGUMENT

I. Incriminatory statements made by appellant, in response to police interrogation that began immediately following his arrest, were improperly admitted into evidence in violation of appellant's constitutional rights.

(With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 205-229, 238-245, 277-278, inclusive.)

Appellant contends that any statements he made in response to the interrogation that occurred immediately following his arrest were obtained in violation of his constitutional right to the assistance of counsel, as provided in the Sixth Amendment, and thus were not admissible in evidence against him. Appellant's position is that under the principles of Escobedo v. Illinois, 378 U.S. 478 (1964), he was entitled to the assistance of counsel at the time of his interrogation, and, since he did not intelligently and understandingly waive that right, the admission of his confession into evidence was improper.

In Escobedo, the Supreme Court held that the right "to the assistance of counsel," as provided in the Sixth Amendment, extended to a suspect held in police custody for purposes of interrogation where it was clear from the record that (1) the police effort had "begun to focus" on the accused, (2) its purpose was "to elicit a confession" from him, (3) the suspect had requested permission to see his lawyer but had not been allowed to do so, and (4) the suspect had not been effectively warned of his right to remain silent. Appellant recognizes that much has been said regarding the scope and application of Escobedo, and that lower courts have differed in their interpretation of that case. The Supreme Court has recently heard argument in five cases raising a variety of questions regarding the meaning of Escobedo, and some clarification on the subject will doubtless be forthcoming.[1/] Pending the outcome of those cases, however, appellant sets forth his contentions below.

Prior to the decision in Escobedo, there had been no square holding by the Supreme Court that a voluntary confession, obtained while the accused was in police custody, might be considered inadmissible solely on the ground that the accused had been denied the assistance

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1/ The five cases now before the Supreme Court are Miranda v. Arizona, 401 P.2d (Ariz. Sup. Ct. 1965), docket No. 759; Vignera v. New York, 15 N.Y. 2d 970 (N.Y. Ct. App. 1965), docket no. 760; Westover v. United States, 342 F.2d 684 (9th Cir. 1965), docket no. 761; Johnson v. New Jersey, 206 A.2d 737 (N.J. Sup. Ct. 1965), docket no. 762; and California v. Stewart, 400 P.2d 97 (Calif. Sup. Ct. 1965), docket no. 584.

of counsel.[2] In the absence of any such holding, the prevailing rule in federal prosecutions has been the McNabb-Mallory rule,[3] an exclusionary rule of evidence prohibiting the use of voluntary confessions obtained during a period of "unnecessary delay" between arrest and presentment before a magistrate.

One corollary of the McNabb-Mallory rule has been the so-called "spontaneous threshold confession" rule, which apparently had its origin in United States v. Mitchell, 322 U.S. 65 (1944). In Mitchell, decided one year after the McNabb case, the Supreme Court ruled that a confession obtained before a period of illegal detention had occurred was not subject to the exclusionary rule adopted in McNabb. (In Mitchell, the defendant had confessed "within a few minutes" after arriving at the police station, and the Court referred to his "spontaneous cooperation and concession of guilt." (322 U. S. 65, 69, 70.)) In the instant case, the court below permitted the introduction of appellant's statements after finding them to be voluntary "threshold" admissions. (See Tr. 239.)

This Court has upheld the admissibility of spontaneous threshold confessions in a number of cases. (See, e.g., Metoyer v. United States, 102 U. S. App. D. C. 62, 250 F.2d 30 (1957); Heideman v. United States, 104 U. S. App. D. C. 128, 259 F.2d 943 (1958), cert. den. 359 U. S. 959; Bailey v. United States, 117 U. S. App. D. C. 241, 328 F.2d 542 (1964);

2/ But see Spano v. New York, 360 U. S. 315 (1959), concurring opinions.

3/ McNabb v. United States, 318 U. S. 332 (1943), and Mallory v. United States, 354 U. S. 449 (1957).

Ramey v. United States, 118 U. S. App. D. C. 355, 336 F.2d 743 (1964), cert. den. 379 U. S. 840; Jackson v. United States, 119 U. S. App. D. C. 100, 337 F.2d 136 (1964), cert. den. 380 U. S. 935; Long v. United States, 119 U. S. App. D. C. 209, 338 F.2d 549 (1964).) The rationale of these cases generally has been that the police must have some opportunity to question the accused, at least in order to ascertain whether he is the right man to be held, and also to afford the accused an opportunity to offer an alibi that may justify his release.[4/] If, during the course of such threshold questioning the accused admits his guilt or makes other incriminating statements, this Court has generally permitted the use of such statements at trial, since they were not obtained during a period of illegal detention. It should be clear, however, that the spontaneous threshold confession rule is concerned only with the point in time at which a confession is made. It is merely the other side of the McNabb-Mallory coin, and as a rule of evidence must now give way to the constitutional principles enunciated in Escobedo.

The precise issue here, then, is whether the principles of Escobedo extend to the facts of the instant case. The crucial questions under Escobedo are:

(1) Had the police process begun to focus on the accused?

(2) Was he interrogated for the purpose of eliciting a confession?

4/ See, e.g., Heideman, supra. See also, Jones v. United States, 119 U. S. App. D. C. 284, 342 F.2d 863, 865 (1964).

If these two questions are answered in the affirmative, the accused was clearly entitled to the assistance of counsel at the time of his interrogation, and no statements obtained from him as a result of such interrogation may be used against him, unless he can be said to have waived his constitutional rights. (As will be developed more fully below, whether the accused has been advised of his rights and whether he actually requested counsel, the other two elements in the Escobedo holding, go only to the question of waiver, and not to the very existence of the right to counsel.)

The reasons behind the constitutional rule developed in Escobedo were clearly articulated by the Court, as follows:

> "It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' Watts v. Indiana, 338 U. S. 49, 59 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. Massiah v. United States, supra, at 204; Hamilton v. Alabama, supra; White v. Maryland, supra. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." (378 U. S. 478, 488.)

In other words, the Sixth Amendment's right to the assistance of counsel extends to every "critical stage" in the proceedings against the accused. And the right is designed, so far as here pertinent, to assure the accused that, at every such stage, he will be warned and advised of his privilege against self-incrimination, not by the police themselves, but by a lawyer who is acting on his behalf.

Applying the Escobedo tests here, there can be no doubt that the police process had "begun to focus" on appellant. A warrant had been obtained for his arrest, presumably on a showing that "probable cause" existed for believing he had participated in the robbery, and his arrest was made pursuant to that warrant.

Next, there can be no doubt that appellant was interrogated for the purpose of eliciting a confession from him. No other explanation can be offered for the questions put to him, including "what part he had in the holdup," and "how much money did he get." (Tr. 209-210.) Incriminating answers to questions of this sort obviously would constitute admissions of guilt.

In Escobedo, of course, the interrogation took place at the police station after the defendant had been arrested and taken there. Here, by contrast, the interrogation was conducted at the scene of the arrest, on the "threshold," so to speak. But there can be no doubt that this appellant was at a "critical stage" in the proceedings against him when he was subjected to the line of questioning set forth above. Statements made by him in his hospital room in response to such questions would be just as incriminating as statements made later at the station

house. Surely there is no difference under Escobedo between confession-seeking interrogation that occurs at the police station and similar interrogation conducted at the very time and place of arrest.

It should be borne in mind that nothing in the Escobedo rule affects the threshold questioning sanctioned in cases such as Heideman, supra, where there may be some uncertainty about whether the police have arrested the right man, or where his offering of an alibi might secure his release on the spot. Where the arrest is made pursuant to a warrant, no such justification for threshold questioning exists. In such a case, as here, there is no doubt that the right person has been arrested, and the officers executing the warrant have no authority to release him even if he offers an alibi.5/

Further, there is nothing in Escobedo to prohibit the admissibility of those confessions that are truly volunteered by a suspect before the commencement of interrogation by the police (see Bailey, supra, Jackson, supra, and Long, supra), and nothing to prohibit questions designed solely to "develop investigative leads as to others" (see Greenwell v. United States, 119 U. S. App. D. C. 43, 336 F.2d 962, 966 (1964)).

5/ In Jones v. United States, 119 U. S. App. D. C. 284, 342 F.2d 863 (1964), this Court held inadmissible under the McNabb-Mallory rule both an oral confession obtained within two or three minutes after police questioning began and a written confession signed by the defendant some two hours later. The Court reasoned that since the defendant had been arrested under authority of a warrant, there was no justification for questioning him at all until he was brought before a magistrate as required by Rule 40(b), Fed. Rules Crim. Proc. See also Greenwell v. United States, 119 U. S. App. D. C. 43, 336 F.2d 962, 964, n. 3 (1964).

The rule of Escobedo is that where the police have focused on the accused and undertake to interrogate him for the purpose of obtaining a confession, his Sixth Amendment rights attach at the moment the interrogation begins.[6] Where, as here, both of the foregoing conditions are satisfied, any statements made by the accused without the assistance of counsel simply are not admissible against him -- unless, of course, he can be said to have waived his rights.

It is in this connection, on the question of waiver, that the two remaining features of Escobedo are pertinent. As has been indicated, those features are the fact that the defendant there had not been advised of his right to remain silent, and the fact that he had affirmatively requested permission to see his lawyer.

That these aspects of Escobedo go only to the question of waiver is clear enough. The right of an accused to the assistance of counsel obviously does not depend for its existence upon a failure to be advised by the police of his right to remain silent. As the Court itself stated, the very reason for extending the right to counsel to the accusatory, or interrogation, stage, is that under our Constitution one accused of a crime has a right "to be advised by his lawyer of his privilege against

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6/ Jackson v. United States, 119 U. S. App. D. C. 100. 337 F.2d 136 (1964), cert. den. 380 U. S. 935, is readily distinguishable. In that case, this Court upheld the admissibility of an oral confession volunteered to District police officers after the defendant had been arrested in New York and presented before a U. S. Commissioner there. Nothing in the opinion in that case indicates that the defendant had been subjected to any interrogation before he made his confession, and one of the essential conditions of the Escobedo rule thus was unquestionably missing.

self-incrimination." (378 U. S. 478, 488.) (Emphasis supplied.) Thus, whether the accused received a police warning of his rights can be no more than one factor to be considered in determining whether he waived them.

Similarly, one's right to the assistance of counsel at the accusatory stage does not come into being only if counsel is requested. It would be a hollow right indeed that depended for its existence on the acumen and sophistication of the very person it was designed to protect. Failure to request a lawyer, like the failure to receive a warning, bears only on the question whether the accused, in responding to the police, can be said to have waived his rights.

The test for finding a waiver of the right to counsel has been set forth by the Supreme Court on several occasions. Recently, in Carnley v. Cochran, 369 U. S. 506 (1962), the Court framed the test as follows:

> "But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.
>
> * * * *
>
> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (369 U. S. 506, 513, 516.)

And, in Johnson v. Zerbst, 304 U. S. 458, 464 (1938), it was pointedly observed that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."

As indicated in Carnley, the test is whether the record shows

an "intelligent and understanding" election not to utilize the assistance of counsel while being subjected to police interrogation. In short, there must be some affirmative indication that counsel was not wanted.

In Escobedo, with no warning of any kind having been given to the accused, and with an affirmative request for counsel having been made by him, the Court could not possibly have found a waiver, and it so stated in its opinion. (See 378 U. S. 478, 490, n. 14.)

In the instant case, unlike Escobedo, appellant apparently received a police warning of his rights, and never affirmatively requested a lawyer. But, as Carnley makes clear, the question of waiver must be considered in light of all the circumstances surrounding appellant's arrest and interrogation.

In this connection, it is undisputed that appellant's arrest occurred only a short time after he had undergone surgery for his fractured jaw; that he was in need of additional medical treatment at the time of his arrest; that his interrogation began almost immediately after he was arrested, and before he could even finish putting his clothes on; and that the entire incident, from arrest to departure, involved only a matter of minutes. Appellant's action in responding to the police under circumstances such as those surely does not show an "intelligent and understanding" election to waive the assistance of counsel.

It is true that appellant was apparently advised of his rights, and that he made no request for counsel. But, how meaningful could the

police warning have been when appellant found himself being interrogated almost immediately thereafter, while still in the process of getting his clothes on? And Carnley flatly indicates that waiver should not be presumed from a mere failure to request counsel.

On the facts of the instant case, therefore, it seems clear that no understanding and intelligent waiver can be found.

A case quite similar to the instant case is United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), cert. petitioned for, docket nos. 834 and 1004. In Russo, one suspect was interrogated by police shortly after returning to his hospital room following an operation to remove a bullet from his arm. The Third Circuit held that statements made by the suspect under the circumstances were inadmissible under the Escobedo rule, because the suspect had not had the assistance of counsel. After stating that the police interrogation under such circumstances seemed "repugnant to concepts of fairness" (351 F.2d 429, 434), the court discussed the question whether the suspect could be deemed to have waived his right to counsel merely by having failed to request one.

> "Certainly it is untenable to ground a distinction on the fact that Escobedo had already hired his own attorney while Bisignano and Russo would have required appointed counsel. Such a distinction smacks of denial of equal protection once it is determined that there is a right to counsel at this stage of the proceedings. [Citation.]
>
> "The distinction, if there be one, must rest on the absence of a request by Bisignano and Russo to have counsel present during the interrogation. But both reason and precedent dictate against such a distinction.

> "At every other stage of the proceedings at which a right to counsel attaches, the right does not depend on a request for counsel nor can it be presumed that failure to request counsel constitutes a waiver of that right. [Carnley v. Cochran, supra, and other citations.]
>
> "We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. The test of waiver is the same, or should be, no matter what stage of the proceedings is at issue, so long as the right has attached." (351 F.2d 429, 437.)

As has been said, the test for waiver is whether the defendant "intelligently and understandingly" chose not to avail himself of his right to the assistance of counsel. No such showing can be found on the record of the instant case.

Accordingly, the statements made by appellant at the time of his arrest should have been excluded from evidence as a matter of law.

II. The warrant for appellant's arrest was invalid, and the statements made by him at the time of arrest were thus inadmissible as the fruits of an illegal arrest.

(With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 26-27, 29-30, 36, 238-239, 277-278, inclusive.)

The warrant for appellant's arrest issued by the U. S. Commissioner was based upon the complaint and affidavit filed by Detective Dunphy. In pertinent part, the detective's affidavit stated:

> "Reliable information received by the undersigned Detective Sergeant that the above subject, Robert Lee Garnes, was one of the subjects involved

> in this holdup. This information received on Saturday evening, March 27, 1965. Photographs of this subject were shown to the above complainant, Sidney Hudes [manager] and Pat H. Trittipoc [cashier] and subject Garnes was positively identified as being one of the negro males who held up the above market."

Under the decision in Aguilar v. Texas, 378 U. S. 108 (1964), a mere recitation that "reliable information" has been received regarding a suspect's involvement in a crime is not sufficient, of itself, to support the issuance of a warrant. In Aguilar, police officers obtained a search warrant upon the filing of an affidavit that stated, in pertinent part:

> "'Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.'" (378 U. S. 108, 109.)

The Supreme Court held that the search warrant should not have been issued because the magistrate lacked sufficient basis for concluding, through an exercise of independent judgment, that there was probable cause for issuing the warrant. The Court emphasized that the magistrate must act in a "neutral and detached" manner and must not serve merely as a "rubber stamp" for the police. With respect to the affidavit in question, the Court stated:

> ". . .Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that

> the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'
>
> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citation], the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identify need not be disclosed [citation], was 'credible' or his information 'reliable.'" (378 U. S. 108, 113-114.)

Since the test of validity is the same for an arrest warrant as for a search warrant (see Aguilar, supra, at 112, n. 3), there can be no question that the warrant for appellant's arrest in the instant case was invalid to the extent it was based on the statement that "reliable information" had been received regarding appellant's involvement in the robbery.

The only possible basis for supporting issuance of the warrant, then, is the detective's further statement that photographs of appellant had been shown to the manager of the store and one of the cashiers, and that appellant had been "positively identified" as a participant in the holdup.

However, developments at the trial in the instant case make it clear that reliance upon such a statement as a basis for obtaining a warrant is subject to the same vice as is reliance upon the "reliable

information received" type of statement condemned in Aguilar. Thus, when Sidney Hudes, manager of the Food Plaza, was questioned on cross-examination regarding his identification of appellant, the following colloquy occurred:

> "Q. Following the time that -- this two or three days later probably when you were shown a mug book, when were you able to pick out the defendant Garnes?
>
> "A. I didn't pick out any defendant from a picture.
>
> "Q. Where did you first see Garnes to your recollection after March 26?
>
> "A. Here in this court.
>
> "Q. This morning?
>
> "A. In this court. He was here yesterday too.
>
> "Q. Yesterday was the first time you had seen him since that time?
>
> "A. Yes, sir.
>
> "Q. And you had never seen him in a lineup?
>
> "A. No.
>
> "Q. And you had never seen him in a mug book?
>
> "A. No." (Tr. 29-30.)

In other words, appellant never was "positively identified" by Hudes, contrary to what Detective Dunphy had indicated in his affidavit, and contrary to what the Commissioner had undoubtedly assumed when he issued the warrant. It thus appears that the warrant for appellant's arrest was issued on the strength of at least one glaringly untruthful

representation.[7]

The Hudes revelation at the trial bears out the very fears which concerned the Court in Aguilar. As that case makes clear, it is imperative that the issuing magistrate be supplied with enough information to enable him to make his own determination as to the reliability or authenticity of the statements relied upon to obtain the warrant. He must not act as a "rubber stamp" for the police. Yet, if a warrant were issued on a mere statement that the accused had been positively identified, the issuing magistrate would be no more than a rubber stamp. He would have relied solely and entirely on the word of the police officer, with no independent information to support it. And, as the instant case sharply illustrates, such reliance can sometimes prove to be ill-advised.[8] The magistrate must have before him sufficient facts to permit an exercise of his own independent judgment on the question of probable cause.

Interestingly, the instant affidavit also contains no affirmative allegation that Detective Dunphy personally conducted the identification process, or that he personally knew that the identification had been made. It is at least possible, therefore, that the detective himself was relying upon information that had been given to him by another officer, and this possibility points up even further the

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7/ Pat H. Trittipoe, cashier, was not questioned about her possible identification of appellant by photograph, no doubt because she could not identify him in the courtroom. (See Tr. 105.) There is, however, nothing in the record to show that she ever identified appellant.

8/ Cf. Jackson v. United States, ___ U. S. App. D. C. ___, 353 F.2d 862 (1965).

defects in the affidavit.[9/]

Since the Commissioner lacked sufficient basic information on which to form an independent judgment as to probable cause, the warrant he issued for appellant's arrest must be held invalid. And, under the principles of Wong Sun v. United States, 371 U. S. 471 (1963), appellant's statements made immediately following his arrest must be considered the inadmissible fruits of an illegal arrest. Wong Sun involved various applications of the exclusionary rule relating to evidence obtained as the result of an illegal arrest. The Court made it clear that the rule encompasses not only physical evidence, but verbal evidence as well.

> "Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." (371 U. S. 471, 485.)

Statements made by the illegally arrested person in Wong Sun were thus held inadmissible at his trial.

It is true that no attempt was made at the trial of the instant case to exclude appellant's statements on the ground that they were obtained through an illegal arrest. In fact, the trial judge expressly found that the police officers were acting pursuant to a "valid arrest warrant." (Tr. 238.) For the reasons set forth above, however, appellant believes it was "plain error" for the trial judge to have ruled that the warrant was valid and to have permitted the introduction of appellant's statements made immediately following his arrest. Those statements were

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9/ See Aguilar, supra, at 114, n. 4.

obtained from appellant as the result of an illegal arrest, and their admission into evidence was thus so erroneous as to justify reversal under Rule 52(b), Fed. Rules Crim. Proc.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the judgment of conviction and remand the case for a new trial.

Respectfully submitted,

Jerome B. Libin

1200 Farragut Building
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I, Jerome B. Libin, counsel for appellant (appointed by this Court) hereby certify that on March 18, 1966, I served the foregoing Brief for Appellant on appellee by causing a copy thereof to be delivered to the United States Attorney for the District of Columbia, United States Court House, Washington, D. C.

Jerome B. Libin